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Supreme Court of the United States

October Term, 1966.

No. 686

ALBERT BARNES ZINK, HERBERT C. SMYTH and STERLING OIL OF OKLAHOMA, INC.,
Petitioners,

versus

HOWARD M. PACK, JOSEPH KAHN and GEO. H. JETT DRILLING CO., INC.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above-entitled cause on the 23rd day of June, 1966.

CITATIONS TO OPINIONS BELOW.

The trial court entered its orders without opinion. (R. 86.) The opinion of the circuit court of appeals, printed in Appendix A hereto, *infra*, pp. 19-36, and is reported in 362 F.2d 723.

JURISDICTION.

The opinion of the circuit court of appeals was entered on June 23, 1966, Appendix A hereto, *infra*, pp. 19-36. Rehearing was denied on August 11, 1966. (R. 135.) The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

QUESTIONS PRESENTED.

1. Does a complaint seeking a declaratory judgment that a written agreement (Sterling Agreement) between defendant A (Jett and Chamberlain) and defendant B (Sterling and its trustee) is void because corporate defendant B was not authorized to do business in the state where the agreement was made, or if valid, to interpret it to plaintiff's advantage, present a "separate and independent claim or cause of action" between defendant A and defendant B within the removal statute, where: (a) the plaintiff (Pack-Kahn) by agreement between plaintiff and defendant A has acquired property from defendant A "subject" to plaintiff's paying a proportionate share of defendant A's personal obligation to defendant B; (b) plaintiff has no contractual or other relations with, or obligation to defendant B; (c) defendant B has made no demand upon plaintiff; (d) defendant B has disclaimed any right of action defendant B may have against plaintiff; and, (e) defendant A is capable of fully performing defendant A's personal obligation to defendant B?

2. Does "a separate and independent claim or cause of action" within the removal statute exist between de-

fendant A (Jett and Chamberlain) and defendant B (Sterling and its trustee) where a plaintiff (Jett Drilling) that had acquired an interest in certain oil leases brings a declaratory judgment action against defendant A and defendant B to declare an agreement between defendant A and defendant B void because corporate defendant B was not authorized to do business in the state where the agreement was made where: (a) plaintiff has no contractual or other relations with, or obligations to defendant B; (b) defendant B has made no demand upon plaintiff; (c) defendant B has disclaimed any right of action which defendant B may have against plaintiff; and, (d) defendant A is capable of fully performing defendant A's personal obligation to defendant B or defendant A is capable of paying damages to defendant B because of defendant A's breach of defendant A's personal obligation to defendant B?

3. Does a complaint that seeks to declare a written agreement (Sterling agreement) between defendant A (Jett and Chamberlain) and defendant B (Sterling and its trustee) void because corporate defendant B was not authorized to do business in the state where the agreement was made, contain a separate and independent claim or cause of action between defendants A and B, where the complaint fails to set forth a justiciable controversy between plaintiff and defendant B?

STATUTE INVOLVED.

The statutory provision involved is Section 1441(c) of Title 28 United States Code, 62 Stat. 937, which provides:

> Whenever a separate and independent claim or cause of action, which would be removable if sued upon alone, is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters not otherwise within its original jurisdiction.

STATEMENT.

On March 26, 1963, Jett, a Louisiana citizen, and Chamberlain, an Alabama citizen, commenced an action (Jett-Chamberlain action) in the Circuit Court of Mobile County, Alabama, against Zink, a Pennsylvania citizen, and Smyth, a New York citizen, both as individual trustees for Sterling Oil of Oklahoma, Inc. (Sterling), a Delaware corporation, having its principal place of business in Oklahoma, under the Alabama declaratory judgment act, Title 7, Section 157, Code of Alabama 1940 (Recompiled 1958), printed in Appendix B hereto, *infra*, p. 37, for a declaration that a written agreement (Sterling Agreement) between Jett and Chamberlain, on the one hand, and Zink and Sterling, on the other, was void because Sterling was not authorized to do business in Alabama on the effective date of the Sterling Agreement and for an interpretation of the Sterling Agreement in the event the Sterling Agreement was valid. (Appendix A hereto, *infra*, p. 19.) The Jett-Chamberlain action was removed to the United States District Court for the Southern District of Alabama. (Id.) Pack and Kahn, New York citizens, and Geo. H. Jett Drilling Co., Inc.

(Jett Drilling), a Delaware corporation, all represented by the same counsel as Jett and Chamberlain, with the consent of Jett and Chamberlain, moved to intervene as parties plaintiff in the Jett-Chamberlain action; Jett and Chamberlain moved for an order making Cornwall Trading Corporation (Cornwall), a Delaware corporation, an involuntary plaintiff, and Jett and Chamberlain anticipating the granting of the motions to intervene and the motion to add an involuntary plaintiff, moved to remand on the ground that with the coming in of the additional plaintiffs, diversity was destroyed. (Appendix A hereto, *infra*, p. 20. Zink, Smyth and Sterling filed an answer and a counterclaim in the Jett-Chamberlain action praying for a money judgment against Jett and Chamberlain and a declaration of rights of Sterling under the Sterling Agreement. While the motions to intervene and to remand in the Jett-Chamberlain action were under consideration, Pack, Kahn and Jett Drilling commenced this action (Pack-Kahn action) in the Circuit Court of Mobile County, Alabama, against, among others, Zink, Smyth, Sterling, Jett, Chamberlain, Cornwall and Citronelle-Mobile Gathering System Co., Ltd. (Citmoco), a partnership composed of Pack, Kahn, Jett and Chamberlain, for the same relief requested in the Jett-Chamberlain action. (R. 14.) Zink, Smyth and Sterling removed the Pack-Kahn action alleging fraudulent joinder and the existence of a separate controversy between Jett and Chamberlain and Sterling and its trustees and moved the District Court to take judicial notice of the Jett-Chamberlain action. (R. 9.)

The district court denied the motions to intervene and to remand in the Jett-Chamberlain action and denied the motions to remand in the Pack-Kahn action without opinion. (Appendix A hereto, *infra*, p. 21.) Jett, Chamberlain, Pack, Kahn and Jett Drilling appealed pursuant to 28 U.S.C. 1292(b). (R. 90, Appendix A hereto, *infra*, p. 21.)

The court of appeals consolidated the Jett-Chamberlain action and the Pack-Kahn action. (R. 99.) The court of appeals found that the Jett-Chamberlain action was properly removed but that the Pack-Kahn action must be remanded because of the failure of proof of fraudulent joinder and because no separate controversy was presented. (Appendix A hereto, *infra*, pp. 30, 31, 33.)

On May 1, 1959, Jett and Chamberlain acquired from Gulf Oil Corporation and Gulf Refining Company (Gulf) certain producing oil wells and certain nonproducing oil leases and a Gathering System running from the Citronelle Oil Field to tidewater in Mobile County, Alabama. (R. 17.)

Jett and Chamberlain by agreement with Pack and Kahn made as of June 24, 1959, effective May 1, 1959, assigned a 5¾% interest in the Gathering System to Pack and Kahn. (R. 21.)[1] Jett and Chamberlain by agreement with Cornwall made as of June 24, 1959, effective May 1, 1959, assigned a 23% interest in the

[1] The entire instrument is printed in the printed record in the court of appeals in the Jett-Chamberlain action at pages 101 et seq.

Gathering System to Cornwall. (R. 21.)[2] By supplemental agreement made as of May 1, 1959, between Pack, Kahn and Cornwall with Jett and Chamberlain, Pack, Kahn and Cornwall agreed that their interests in the Gathering System "are and shall be subject to their proportionate share of their obligation to pay the percentages of gross profits of the System to Sterling." (R. 21.)[3]

By the Sterling Agreement (1) Jett and Chamberlain agreed to pay Sterling's trustees a "sum equal to five per cent of the gross profits of the Gathering System. . . out of, and only to the extent that there shall be available proceeds applicable to the interest of Jett and Chamberlain from the Gathering System after payment of all expenses" and certain indebtedness incurred by Jett and Chamberlain in connection with the acquisition of the Gathering System (R. 52-5.); and, (2) Jett and Chamberlain agreed to assign an overriding royalty interest in certain producing and certain nonproducing properties acquired by Jett and Chamberlain from Gulf to Sterling's trustees upon the happening of certain events. (R. 50-2, 55.) The Sterling Agreement provides that:

> Nothing in this Agreement contained shall operate as a conveyance to Sterling or to any trustee for Sterling, of an estate in land, nor shall the same operate as a conveyance or assignment of any interest whatsoever in any lease. . .

(R. 60.) Jett Drilling, without warranty of title, acquired certain of the nonproducing properties from Four States

[2] Id. pages 206 et seq.
[3] Id. pages 118-9.

Drilling Company who had acquired the leases from Jett and Chamberlain. (R. 22.)

None of the complaints allege that Sterling or its trustees have ever made any demand upon Pack, Kahn, Cornwall or Jett Drilling. Sterling, in its counterclaim in the Jett-Chamberlain action asks no relief of Jett and Chamberlain which Jett and Chamberlain are not capable of performing without interfering with any interest of Pack, Kahn, Cornwall or Jett Drilling.[4]

On April 22, 1965, Zink, Smyth and Sterling filed a disclaimer in the court of appeals disclaiming any right of action against Pack, Kahn, Cornwall and Jett Drilling arising out of the allegations of the proffered complaints in the Pack-Kahn action and arising out of the allegations in the motion to add parties plaintiff in the Jett-Chamberlain action. (R. 137-8.)

The court below affirmed the action of the district court in refusing to remand the Jett-Chamberlain action saying:

> We do not see how, win, lose or draw, the rights of the absent parties could be injuriously affected by any decree that might be entered in the case.

(Appendix A hereto, *infra*, p. 30.)

With respect to the Pack-Kahn action, the court below held that Pack, Kahn, Cornwall and Jett Drilling "have an obvious interest in the validity of the Sterling Agree-

[4] Printed record in the court of appeals in Jett-Chamberlain action page 93.

ment and in an interpretation of it to their advantage" and the only question before the court was whether a plaintiff had stated a cause of action against a defendant "within the provisions of the declaratory judgment law of Alabama, Code of Alabama of 1940, Title 7, § 157 (1958), which so far as here material reads: 'Any person interested under a. . .written contract, or other writings constituting a contract, or whose rights, status, or other legal relations are affected by a . . . contract . . ., may have determined any question of construction or validity arising under the . . . contract . ... and obtain a declaration of rights, status, or other legal relations thereunder.'" (Appendix A hereto, *infra*, p. 32.)

The court held that the plaintiffs in the Pack-Kahn action had stated a cause of action against a defendant and went on to hold that the causes of action so stated were not separate and independent claims or causes of action within the removal statute. In the words of the court of appeals, (Appendix A hereto, *infra*, p. 34):

> The result is unfortunate in that it leaves the same issues pending simultaneously in a state and federal court but we see no escape from our conclusion.

REASONS FOR GRANTING THE WRIT.

1. This case involves a question of importance concerning the respective jurisdiction of federal and state courts under the removal statute. The prompt, economical and sound administration of justice depends upon the resolution of the issues presented by this case.

This case presents a problem concerning the interpretation of "a separate and independent claim or cause of action" as used in the removal statute where (a) several plaintiffs because of a common question of law or fact join in a single action against a defendant, and (b) a plaintiff because of a common question of law or fact joins several defendants in a single action. The problem is likely to arise on many occasions because of the trend in modern practice to allow the permissive joinder of plaintiffs and defendants in one action. The solution to the problem is complicated by the fact that under declaratory judgment statutes the normal position of plaintiff and defendant is reversed. The owner of a truck whose truck was involved in an accident with a train might bring a declaratory judgment action against the railroad and all of the passengers and crew of the wrecked train to determine whether the railroad or the driver of the truck was negligent. If the railroad and the owner of the truck were citizens of the same state, would the action be removable at the instance of a passenger on the train who was a citizen of another state? The railroad might bring an action against its crew and passengers and the driver of the truck for a declaration that the accident was caused solely through the negligence of the truck driver who was a citizen of the same state as the railroad. Two parties, each of whom had entered into separate and distinct contracts with a corporation, on the same day might bring an action to annul their separate contracts because the defendant corporation was not authorized to do business in the state where the contracts were made.

Here, Pack, Kahn and Jett Drilling brought an action against Sterling and its trustees and against Jett and Chamberlain seeking a declaratory judgment that the Sterling Agreement, a contract to which neither Pack, Kahn nor Jett Drilling were parties, was void or if valid, to interpret the Sterling Agreement to the alleged advantage of Pack and Kahn. Both the district court and the court of appeals found that the issues presented "a controlling question of law as to which there is substantial ground for difference of opinion" when they allowed an appeal pursuant to 28 U.S.C. 1292(b). (R. 86, 98.)

This cause demonstrates the delay which is caused when this Court has not spoken authoritatively on an important question involving federal jurisdiction, practice and procedure. The motion to remand was submitted to the district court on September 27, 1963, and denied on December 27, 1963; the appeal was submitted on March 23, 1965. The court of appeals rendered its decision on June 23, 1966. (R. 7, 100, 101.)

2. The decision of the court below is in conflict with decisions of the Court of Appeals for the Eighth Circuit. In *Evangelical Lutheran Church v. Stanolind Oil and Gas Co.*, 8 Cir., 1958, 251 F.2d 412, the court was careful to hold at page 416:

> . . .the form of the action should not be permitted to obscure the circumstances and does not merge the separate and independent claims into one.

and then went on to find that a "separate and independent claim or cause of action" was presented where the actions

were to quiet title to certain real property against several defendants, each defendant claiming under a separate source of title. *Mitchell v. Southern Farm Bureau Casualty Ins. Co.*, W.D. Ark., 1961, 192 F. Supp. 819, 823, affirmed 8 Cir., 1963, 312 F.2d 485 and *Shaw v. Hartford Accident and Indemnity Company*, W.D. Missouri, 1959, 178 F. Supp. 571, 572, affirmed 8 Cir., 1959, 273 F.2d 133, 135, n. 2, specifically held that the plaintiff's selection of a declaratory judgment action as a vehicle to litigate alleged claims cannot limit or expand the jurisdiction of the federal courts under the removal statute. Compare *White v. United States Fidelity and Guaranty Company*, 1 Cir., 1966, 356 F.2d 746, where White, the plaintiff, a Rhode Island citizen, as a result of an automobile accident and subsequent litigation, became a judgment debtor of defendant Evans, also a Rhode Island citizen. Defendant Fidelity, a Maryland corporation, had issued a liability policy to plaintiff and contended that the policy had been cancelled prior to the accident. Plaintiff brought a petition for a declaratory judgment action in a Rhode Island court seeking a declaratory judgment which would establish Fidelity's coverage of plaintiff and direct Evans to seek satisfaction solely from Fidelity. Fidelity removed to the United States district court pursuant to 28 U.S.C.A. 1441(c). The court of appeals relying on *Hartford Accident and Indemnity Company v. Shaw*, 8 Cir., 1959, 273 F.2d 133, n. 2, held that plaintiff's claim against Fidelity was separate and independent.

Here, the court below specifically relied on the Alabama declaratory judgment act to establish that Pack, Kahn and Jett Drilling had pleaded a cause of action against

Sterling and its trustees; *infra*, p. 32. In the absence of the declaratory judgment statute, neither Pack, Kahn nor Jett Drilling could have maintained an action against Sterling and its trustees because neither Sterling nor its trustees have any contractual relations with Pack, Kahn or Jett Drilling; neither Sterling nor its trustees have ever made or have alleged to have made a demand on Pack, Kahn or Jett Drilling; and, neither Sterling nor its trustees have or claim any interest in any property owned by Pack, Kahn or Jett Drilling.

3. The decision of the court below is in conflict with the decision of the Court of Appeals for the Tenth Circuit in *Greenshields v. Warren Petroleum Corporation, et al*, 10 Cir., 1957, 248 F.2d 61, cert. deni. 355 U.S. 907, where the court held that plaintiff's claims against several defendants in connection with the disposition of oil from plaintiff's leases were separate and independent under the removal statutes because the claims against the several defendants arose under separate contracts and from acts occurring at different times.

Here, Sterling's rights are based upon a contract between Sterling and Zink, on the one hand, and Jett and Chamberlain, on the other. The Sterling Agreement was carefully drawn to make the obligations of Jett and Chamberlain personal obligations to Zink and Smyth and to prevent Sterling or its trustees from acquiring any interest in property. (R. 60.) Jett and Chamberlain's obligations are personal obligations to pay money to Sterling's trustees and to transfer interest in certain oil royalties to Sterling's trustees upon the happening of con-

tingent events. (R. 50 et seq.) Pack, Kahn and Cornwall's claims are of necessity based upon the separate and distinct agreement between Pack, Kahn and Cornwall with Jett and Chamberlain. Jett Drilling's claim is of necessity based upon the conveyance from Jett and Chamberlain to Jett Drilling's predecessor in title. Neither Sterling nor its trustees have any contractual relationships with Pack, Kahn, Cornwall or Jett Drilling.

4. The decision of the court below is erroneous.

The only case or controversy in which Sterling is interested or involved will be tried in the federal court in the Jett-Chamberlain action where Sterling has filed a counterclaim against Jett and Chamberlain for an accounting and declaration of rights under the Sterling Agreement. Sterling is not interested in what Pack, Kahn, Cornwall or Jett Drilling acquired from Jett and Chamberlain. A nice question might arise between Jett and Chamberlain, on the one hand, and Pack, Kahn, Cornwall and Jett Drilling, on the other, as to which of these parties would obtain a benefit if the Sterling Agreement is in fact invalid. Sterling desires to have its dispute with Jett and Chamberlain tried in the federal court. Sterling does not care where Pack, Kahn, Cornwall or Jett Drilling try their case because from Sterling's point of view, Sterling neither has, has ever had, or can have a dispute with Pack, Kahn, Cornwall or Jett Drilling. Sterling's lack of interest in any claim against Pack, Kahn, Cornwall or Jett Drilling is conclusively established by Sterling's disclaimer against Pack, Kahn, Cornwall and Jett Drilling. (R. 138-9.)

The gravamen of Sterling's complaint is that the remand of the Pack-Kahn action to the state court requires Sterling to litigate the controversy between Jett and Chamberlain, on the one hand, and Sterling and its trustees on the other in the Pack-Kahn action, in the state court. The defendants, Jett and Chamberlain, have already filed a cross-claim against Sterling and its trustees adopting the allegations of the complaint of Pack and Kahn in this, the Pack-Kahn action. (R. 87-8.) According to the court below, the result of the decision of the court below:

> . . . is unfortunate in that it leaves the same issues pending simultaneously in a state and federal court but we see no escape from our conclusion.

The result is more than unfortunate to Sterling because it forces Sterling to try its controversy between Jett and Chamberlain concerning Jett and Chamberlain's obligations under the Sterling Agreement in the state court when Sterling and its trustees as a matter of right had removed the controversy to the federal court in the Jett-Chamberlain action pursuant to 28 U.S.C.A. 1441(b).

We submit that a proper interpretation of 1441(c) will eliminate the unfortunate result of the decision of the court of appeals. The court of appeals, we submit, misconstrued the teachings of *American Fire & Casualty Co. v. Finn*, 341 U.S. 6, where there was "a single wrong to plaintiff arising from an interlocked series of transactions in which plaintiff was involved". Here, Sterling and its trustees are involved in only one transaction, the Sterling Agreement. None of the plaintiffs, other than the re-

aligned plaintiffs, Jett and Chamberlain, is involved in or a party to the Sterling Agreement. Pack, Kahn and Jett Drilling were not involved in the Sterling Agreement. Their involvement, if any, arises from the fact that Pack, Kahn and Cornwall entered into contractual relations with Jett and Chamberlain in which Sterling was neither a party nor involved, and Jett Drilling purchased an interest in a nonproducing lease from a grantee of Jett and Chamberlain.

We do not see on what theory Pack, Kahn, Cornwall or Jett Drilling have any cause of action against Sterling or its trustees; however, we submit that if Pack, Kahn, Cornwall or Jett Drilling have a cause of action against Sterling or its trustees, such cause is "a separate and independent claim or cause of action" from the cause between Jett and Chamberlain and Sterling and its trustees.

CONCLUSION.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Dated at Mobile, Alabama, this ..... day of October, 1966.

Respectfully submitted,
WILLIS C. DARBY, JR.,
Counsel for Petitioners,
Post Office Box 1273,
Mobile, Alabama 36601.

CERTIFICATE OF SERVICE.

I, Willis C. Darby, Jr., counsel for petitioners, hereby certify that I have served a copy of the foregoing Petition For A Writ Of Certiorari on Howard M. Pack and Joseph Kahn by mailing a copy thereof to their attorney, C. B. Arendall, Jr., and on Geo. H. Jett Drilling Company by mailing a copy thereof to its attorney, Harry H. Riddick, all this the .... day of October, 1966.

WILLIS C. DARBY, JR.